

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED

APR 9 1975

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
1255-s40J BY MITCHELL GRAZING ASSOCIATION

)
) FINDINGS OF FACT, CONCLUSIONS
) OF LAW, AND ORDER

Pursuant to the provisions of the Montana Water Use Act and Administrative Procedure Act, after due notice a hearing was held on August 28, 1974, at Chinook, Montana, for the purpose of hearing objections to the above-named application.

The Applicant, Mitchell Grazing Association, appeared through its spokesman, Don Sheehy, member of the association, and presented testimony and evidence. Objector Eldon Gilmore appeared and testified on behalf of his objection. Objector Wallin Ranch Company was represented by Stuart C. MacKenzie of Chinook, Montana.

A Proposed Order (Proposal for Decision) was issued by the Hearing Examiner, Gary L. Spaeth, on October 29, 1974. The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On November 20, 1974, the Department received an Exception dated November 16, 1974, filed by Stuart C. MacKenzie on behalf of his client, Wallin Ranch Company, in opposition to the Hearing Examiner's Proposed Order of October 29, 1974, in the matter of Application No. 1255-s40J by Mitchell Grazing Association.

On July 1, 1975, the Department received Mr. MacKenzie's Brief supporting his exception in opposition to the Proposed Order, dated June 27, 1975, filed on behalf of his client, Wallin Ranch Company.

J. R. Inman, secretary for the Applicant, Mitchell Grazing Association, was informed by the Department's letter of July 9, 1975, that they had the opportunity to file a Reply Brief within fifteen (15) days after receipt of the Department's letter, since Mr. MacKenzie had filed his Brief dated June 27, 1975, supporting his client's Exception. A copy of Mr. MacKenzie's Brief was enclosed with the Department's letter to Mr. Gilbert. Copies of said letter were also sent to Mr. MacKenzie and Robert J. Schellin, vice president for Wallin Ranch Company.

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By telephone discussion of October 29, 1975, Mr. Inman on behalf of the Applicant, Mitchell Grazing Association, informed the Department that they would not file any more documents (Reply Brief) or request oral argument, since their case had already been presented and would wait until the final decision was issued before taking further action. Mr. Inman further stated that a letter to that effect would be sent. However, no letter was received by the Department.

The Department by its letter of October 29, 1975, to Mr. MacKenzie, informed him that on October 29, 1975, Mr. Inman had contacted this Department and informed us that Mitchell Grazing Association would not file a Reply Brief or request oral argument, since they believed their case had been previously fully presented.

On November 18, 1975, the Department received a letter from Mr. MacKenzie dated November 17, 1975, stating that they do not request oral argument before the Water Resources Division Administrator in Helena, and would have the matter submitted on their objection, exception, and reply brief.

The Department by its letter of February 5, 1976, to Mr. MacKenzie and a copy to Mr. Inman informed both parties that since neither party wished to pursue this matter to an oral argument hearing, it would be forwarded to the Water Resources Division Administrator for preparation and issuance of a Final Order, based on the record in the application file at present.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order, dated October 29, 1974, the application, objections, exceptions, briefs, the testimony of the hearing held on August 28, 1974, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on October 29, 1974, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 1255-s40J to appropriate two (2) acre-feet of water per annum in Blaine County, Montana, to be stored in a two (2)-acre-foot-pit reservoir on an unnamed coulee to an unnamed coulee, a tributary of Lodge Creek, at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, Township 35 North, Range 17 East, M.P.M., and

used for stock-watering purposes from January 1 to December 31, inclusive, of each year, subject to the following conditions:

- (a) The pit reservoir may be filled to capacity once between October 15 of each year and May 1 of the subsequent year, only after the downstream prior water rights of the objectors have been satisfied.
- (b) A bypass of the pit reservoir must be constructed and maintained which will be able to divert all surface water around said pit, and the Department must receive notification of completion of said bypass, and further, that the completion of the bypass be accomplished before May 1, 1977. If said bypass is not constructed by this date, the pit must be filled, or good reason given for not doing so. The Department must be notified in either event or the Application will be automatically terminated.

2. The Provisional Permit as granted is subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

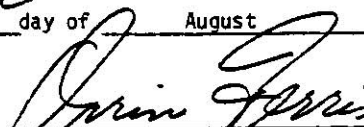
3. It shall be the responsibility of each of the parties not to abuse his water rights at the expense of the other, since these conditions must be essentially self-policing. The Permittee must cooperate with other water users in scheduling his periods of diversion during the time period noted in 1(a) above, so that it will not adversely affect prior downstream water rights.

4. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of the Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical, and keep a log of records of water used for proof of their water rights.

Done this 17th day of August, 1976


Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 1255-S-40J, Mitchell
Grazing Association

Proposal for Decision

Pursuant to the provisions of the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, a hearing was held on August 28, 1974, at Chinook, Montana, for the purpose of hearing objections to the granting of the application captioned above. The applicants appeared through their spokesman, Don Sheehy, a member of the Association, and presented testimony and evidence. The objector Eldon Gilmore appeared and testified on behalf of his objection. The objector Wallin Ranch Company was represented by Mr. Stuart C. MacKenzie of Chinook, Montana.

PROPOSED FINDINGS OF FACT

1. On December 31, 1973, Mitchell Grazing Association filed with the Department, an application for beneficial water use permit to appropriate two(2) acre-feet of water per annum in Blaine County, Montana. The water is to be stored in a two(2)-acre-foot pit on an unnamed coulee to an unnamed coulee, a tributary of Lodge Creek, at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 23, Township 35N, Range 17 East, M.P.M., and used for stock-water purposes from January 1 to December 31, inclusive, of each year.

2. Objections to the application were filed by Eldon Gilmore and Wallin Ranch Company, both of Chinook, Montana.

3. The applicants' diverting works consist of a pit which has been dug in the main water course of the said unnamed coulee.

4. The objector, Wallin Ranch Company, has an apparent prior right on said unnamed coulee to that of the Applicant for stock watering purposes. Said apparent water right does not cover irrigation purposes from the second reservoir of the Wallin Ranch Company located downstream from the pit in question. The upper dam of the Wallin Ranch Company has been used exclusively for stock watering purposes and that there is no release of such water for irrigation purposes. The water which would be released from the upper reservoir would flow into the lower reservoir of the Wallin Ranch Company. That such water has not been released. Based on the testimony of the Vice President of the Wallin Ranch Company, Mr. Robert J. Schellin, there has been no overflow from the upper dam into the lower reservoir.

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5. Three exhibits of the objector Wallin Ranch Company were received into evidence and marked as such. Exhibit "A" is a copy of a photo overlay of the region. Exhibit "B" is a Notice of Appropriation filed by the Wallin Ranch Company on the 29th of June 1973 with the Clerk and Recorder of Blaine County claiming water rights to a stock water reservoir dam located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 35N, Range 17 East, M.P.M., Blaine County, Montana. Exhibit "C" is a Notice of Appropriation filed by the Wallin Ranch Company on the 29th of June 1973 with the Clerk and Recorder of Blaine County claiming water rights to a stock water reservoir dam located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, Township 35N, Range 17 East, M.P.M., Blaine County, Montana.

6. Applicant's Exhibit "1" which is a letter from E. Lee Jones, was received into evidence.

7. The objector, Eldon Gilmore, has no apparent water right to the water of the said unnamed coulee.

8. It appears that there are waters available in the source of supply; that the rights of prior appropriators will not be adversely affected; that the means of diversion are adequate to store such water right; that the means of diversion as they presently exist could adversely affect the apparent prior water rights of the objector, Wallin Ranch Company, that the proposed use of water is a beneficial use; and, that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been issued or for which water has been reserved.

9. There is no present way of diverting water around the diversion facilities of the Applicant.

From the foregoing proposed findings of fact the following proposed conclusions of law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M., a permit to appropriate water from said unnamed coulee for a beneficial use is required.

2. The criteria for issuance of a permit set forth at 89-885, R.C.M. 1947, have been met.

3. The application for beneficial water use permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana with the additional requirements as listed in the proposed order.

Based on the above proposed findings of fact and conclusions of law, the following order is proposed.

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PROPOSED ORDER

1. The applicants' permit is granted allowing the appropriation of two(2) acre feet of water per annum from said unnamed coulee to be diverted at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, Township 35N, Range 17E, in Blaine County, Montana with the following requirements:

- a. That a by-pass of the pit be constructed which will be able to divert all surface water around said pit.
- b. That the Department receive notification of completion of such by-pass.
- c. That the completion of such by-pass will be accomplished before May 1, 1975. If not accomplished by this date, the pit must be filled or good reason given. The Department must be notified in either event or the application will automatically be withdrawn.
- d. That the pit will be allowed to fill to capacity once between October 15, of each year and May 1st of the subsequent year. Upon being filled the by-pass will be regulated so that all other water will be diverted down said unnamed coulee.
- e. The permit is granted subject to existing rights.

Dated this 29 day of October 1974.

Gary L. Spaeth
Gary L. Spaeth
Hearing Examiner

NOTICE: This is a proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2) P6190, written exceptions to this Proposed Order shall be filed with the Administrator within ten (10) days of service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

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